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IN THE

Supreme Court of the United States

OCTOBER TERM 1941

No. 131

UNITED STATES OF AMERICA, *Petitioner,*

against

LOCAL 807 et al., *Respondents.*

BRIEF FOR RESPONDENT LOCAL 807

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BRIEF FOR RESPONDENT LOCAL 807

POINT I

Local 807 is not a "person" within the meaning of the Anti-Racketeering Act.

The proposition that an unincorporated association is not a "person" within the meaning of an Act dealing with violence is, as Judge Clark of the Circuit Court of Appeals put it, "hornbook law". We should, therefore, have thought that the discussion of the subject in our brief in No. 132 was sufficient to dispose of the case as to this respondent. But counsel for the Government have apparently misapprehended the purport of our argument in that brief, as is evident from their reference in their brief to the first Coronado case. We shall therefore return here to the subject for a brief discussion of two aspects of the matter.

It is clear that the case of *United Mine Workers* v. *Coronado Coal Co.* (259 U. S. 344), has not the slightest relevancy to the case at bar. That case was one under the Sherman Act; and that Act specifically includes "associations" within the definition of "person" as used therein. But aside from that, it must be borne in mind that that case was a civil suit, and that the problem before the Court was an entirely different one from that in the case at bar. Counsel for the labor-union in that case did not contend that labor-unions were not within the purview of the Sherman Act, since that question had been disposed of by this Court adversely to that contention in *Loewe* v. *Lawlor*, 208 U. S. 274. The question in the *First Coronado Case* was, therefore, not whether labor-unions were "persons" within the meaning of the Sherman Act, but whether the particular form of action adopted by the plaintiff in that case, in suing the United Mine Workers in its "common" name, instead of in the name of some official as was required by state law, gave the courts jurisdiction over the labor-union defendant. And it is this question that was resolved against the contention of the labor-union in the now famous opinion in that case delivered by Mr. Chief Justice Taft on behalf of this Court.

This disposes not only of the *Coronado Case*, but also of all the other cases cited in this connection by counsel for the Government on page 55 of their brief.

Perhaps we should add here, although it is not necessary to sustain *our* case, that the word "person", as used in the Anti-Racketeering Act, does not, in our opinion, include corporations,—even though, of course, corporations are sued in their common name, and, indeed, cannot be sued otherwise. For the problem here, unlike that before this Court in the *Coronado Case*, was not that of "legal entity", but of the intention of the lawgiver in enacting the particular piece of legislation. And in that connection, it would be, as we have stated in our main brief, a startling novelty in our law to find an unincorporated association (or

a corporation, for that matter) included in a *felony* statute. In this connection, it must be borne in mind that there is a vast difference,—indeed, a *fundamental* difference, between a statute intended to regulate business, in which corporations and associations engage on a par with individuals, and declaring the violation of such regulations to be misdemeanors, and statutes dealing with violence, which can only be perpetrated *by individuals*, and declare the offenders to be *felons*.

It would seem that no Legislature (not even the British Parliament, to hark back to a famous discussion of the omnipotence of that legislative body) could declare either a corporation or an unincorporated association a felon. It certainly could not *punish* them as such.

This brings us to a consideration of the history of our Act,—which seems to us to be decisive on this point, as it is on many others in this case. The bill, as originally drafted by the Senatorial Sub-Committee in charge of the Legislative Program, of which our Act was a part, and as it actually passed the Senate, provided that any "person" convicted of violating the Act,—

> "* * * shall be punished *by* imprisonment from 1 to 99 years, *and*, in addition, by a fine which shall at least be commensurate with the amount of the unlawful gain."

The Act made imprisonment to follow automatically upon conviction. The felon *had* to be imprisoned. It could not, therefore, have had either corporations or unincorporated associations in contemplation. It is true that the imperative imprisonment has been eliminated in the bill as amended in the House of Representatives. But, clearly, that was for the same reason that led to the reduction of the maximum imprisonment from *ninety-nine* to *ten* years,—that is to say, the House of Representatives was of the opinion that the punishment as provided by the bill as it passed the Senate was too drastic, might deter juries

from convicting, and might possibly be attacked on the score of providing for a cruel and unusual punishment. Clearly, there was no intention on the part of the House to change the character of the bill, as is manifest by the fact that the Act, as eventually passed, and as it stands today, still declares the offense to be a *felony*.*

POINT II

The Anti-Racketeering Act clearly does not apply to the activities involved herein insofar as they are chargeable to this respondent.

We respectfully submit that quite apart from the obvious fact that this respondent cannot be prosecuted under the Anti-Racketeering Act because it is not a "person" within its provisions, it is also clear that the Act does not apply to this respondent because of the nature of the activities charged against it. For no matter how wide we consider the net which Congress intended to spread, insofar as "crime" or "criminal elements" are concerned, it is clear that it was not intended to cover violence committed in the pursuit of the legitimate objects of a labor union, but to leave the punishment of that violence to the criminal laws of the states, where it properly belongs.

In this connection, we must consider first of all, the evil which the law was intended to remedy. A reference to the statements made at the hearings of the Sub-Committee of the Senate Committee on Interstate Commerce which resulted in the enactment of the Legislative Program, of which this Act is a part, and to the proceedings in Congress while this Act was under consideration, will clearly demonstrate two things: First, that the sponsors of this legislation, and the Congress which adopted it, intended to

* Perhaps we should also call attention to the fact, pointed out by Judge Clark, that Section 6 of the Act uses language which clearly shows that natural persons were in contemplation.

deal with crimes of an extraordinary nature. And, second, that Congress was most anxious that the net spread should not catch labor-unions, or their members and officials, because of any activities in connection with labor disputes.

We shall limit ourselves here to the second phase of Congressional intent,—namely, the solicitude of Congress that in legislating against a certain class of offenders, the net should not be spread so wide as to cover labor disputes as we believe that to be the heart of this case. In that respect, the problem was very much like the problem which confronted Congress when it had before it the revision of the federal anti-trust law in 1914, and its solution of the problem was the same. Congress did not intend to exempt any *class of persons*, but it did intend to exempt a *class of activities*,—activities growing out of or connected with the organization of labor into labor-unions, and disputes in which these organizations may be involved in the pursuit of their objectives. That Congress intended to completely exempt labor-union activities from the operation of this Act is evident from its legislative history; and that it has succeeded in its purpose is clear from an examination of the Act.

(1) The history of the Act.

A reference to the Congressional history of the Act will show that the bill submitted by Senator Copeland on behalf of the Sub-Committee of the Senate Committee on Interstate Commerce, passed the Senate without a division and without debate. The reason for the haste and lack of consideration need not be gone into here. Suffice it to say, that what happened immediately thereafter clearly demonstrates that it is matter of history that the Senate, in passing this bill, had no suspicion that it might affect labor-unions or their activities; and that as soon as that possibility was brought to its attention, an effort was made to reconsider. It was found, however, that the bill had already gone to the House, and could not be recalled. This

was followed by such amendments by the Judiciary Committee of the House, as satisfied the representatives of organized labor, *and the bill was passed by the House only after a statement to that effect on the floor of the House* (Cong. Rec., Vol. 78, p. 10,867; Materials, pp. 70-71).

(2) The Act itself.

The Act, as passed by the House of Representatives, after the Judiciary Committee had amended it in a manner which proved satisfactory to organized labor, contains three distinct provisions designed to except labor disputes from its operation. There is, to begin with, the exemption in the second section of the Act (now Section 420-a(a) of Title 18, U. S. C. A.) of wages paid by a bona fide employer to a bona fide employee. There is, then, the following provision in the third section of the Act (now Section 420-b), which deals with definitions:

> "The terms 'property', 'money', or 'valuable considerations' used herein shall not be deemed to include wages paid by a bona fide employer to a bona fide employee."

Then there is a special *proviso* contained in the sixth section which deals with *jurisdiction*, reading as follows:

> "*Provided*, That no court of the United States shall construe or apply any of the provisions of this act in such manner as to impair, diminish, or in any manner affect the rights of bona fide labor organizations lawfully carrying out the legitimate objects thereof, as such rights are expressed in existing statutes of the United States."

The Circuit Court of Appeals agreed with our contention that the Congress intended that the Act should not apply to labor disputes; but in doing so it relied mainly on the exemption of wages. We believe that the argument based on that exemption is conclusive. Nevertheless we believe it incumbent upon us to press the argument on the score of the *proviso*. We do not believe that Judge

Learned Hand was justified in his assertion, in the last sentence of his opinion, that the *proviso* is "most obscure", and shows only "a vague intention" to discriminate between violence in labor disputes and elsewhere. On the contrary, we believe that the *proviso* was carefully chosen, and that the Congressional intention to exclude violence committed in labor disputes from the purview of this Act is as clear as it could have been made under the circumstances.

It is evident, even upon a cursory inspection, that when confronted, in 1934, with a problem similar to that with which it had been confronted twenty years earlier when passing the Clayton Act, Congress adopted the formula used in that Act to exempt labor disputes from operation of the Sherman Act in the expectation that it would have the same effect. In this connection, it must be borne in mind that although there was some difference of opinion at some time as to the interpretation of the Clayton Act with respect to boycotts, there never was any doubt but that violence did not bring any activity within the operation of the Sherman Act which would otherwise be outside of its scope. Also, as pointed out by Judge Clark in his concurring opinion in the Circuit Court of Appeals, the word "lawfully" could not possibly refer to violence in this Act, whatever may have been thought of its use in the Sherman Act, for

> "* * * if the acts of violence themselves render the union activities not legitimate, then the proviso becomes wholly meaningless, since it would then say that union activities are excepted only when they do not violate the Act."

In other words, Congress chose a formula which was ready at hand and which, as we have pointed out in our brief in the *Apex Hosiery Case*, clearly drew the distinction between cases growing out of a genuine labor-union activity,—that is to say, a labor dispute,—and cases in which officials of a union misused their position for the

purpose of engaging in the prohibited activities, as part of a conspiracy *of other persons* to achieve different ends in which the union, as a labor organization, was not interested. In an anti-trust case, the line of demarkation is between a labor dispute and cases such as were referred to in the opinion of this Court in the *Apex Case*, in which labor-union officials joined a conspiracy of traders to monopolize or restrain trade in a commodity. In our field, Congress intended to draw the line between a labor dispute on the one hand, and cases where labor-union officials join with industrial racketeers in activities such as were involved in the New York case of *People* v. *Buchhalter, et al.*, discussed in our brief in No. 132, in which the labor-union officials had joined a so-called "protective association" of employers,—that is to say, *nominally* consisting of employers, but in reality organized by the "racketeers", in which membership of employers became compulsory, insofar as the "racketeers" could make it,—in which the labor-union was used as an instrument by the promoters of the "racket" to compel employers to join the employers' "protective association".

That this was the line of demarkation intended by Congress is clear from the hearings before the Sub-Committee of the Senate Committee on Interstate Commerce, and Senator Copeland's oral report to the Senate on behalf of that Sub-Committee, in introducing this Act, as part of the Legislative Program already discussed. And also it is shown in the repeated use of the words "bona fide" in the Act itself: What Congress was clearly worried about was that its action in exempting labor disputes may not defeat the purpose of the Act through the various guises and disguises which the activities of "racketeers" may assume, *since the exemption covered not only labor-unions, but also their officers and members.* Hence the qualification of *bona fides.*

Under the circumstances, we respectfully submit, that the cases decided under the Sherman Act are applicable to the present Act; and that all those labor-union activities

which have been excluded by this Court from the purview of the Sherman Act are thereby also excluded from the purview of the Anti-Racketeering Act.

Apex Hosiery Co. v. *Leader*, 310 U. S. 469;
U. S. v. *Hutcheson*, 312 U. S. 219.

POINT III

This was a genuine labor dispute if ever there was one.

This brings us to the consideration of the question as to the nature of the dispute which gave rise to this case. We shall not discuss on this brief the problem of any excesses which may have been committed by individuals in the carrying out of the policy of the union. Since those excesses could not possibly bring the case within the purview of the Anti-Racketeering Act, any more than the same excesses could bring it within the purview of the Sherman Act.

It is clear that *this respondent*, at least, must be judged by the *purpose* which it, *as an organization*, set out to accomplish. And that that purpose was an "organizational" one,—that is to say, *to obtain employment for its members, by limiting the operation of trucks within the City of New York, in its particular field, to its own members*,—is not only evident from every page of the record, but was expressly stated by the District Attorney in his opening to the jury. Because of the importance of this statement, we shall reproduce it here even though it has already been quoted in our brief in No. 132. It is as follows:

> "The indictment further charges that by reason of this abuse by the defendant Local 807 these drivers who brought the trucks into the city were compelled themselves to stay idle while the trucks were here because of the demand of this local that their men

exclusively be allowed to drive these interstate trucks while they were within the city. * * *

"* * * Our proof will have to do with interference by violence, with threats to commerce by union men of this New York City Local 807, to union men of the same international union from locals in other states, and with the damage and loss to our trade and commerce incident to that interference and with the insistence by this New York local, notwithstanding the fact that these interstate trucks were in many instances being driven by union men, that those trucks be driven in the City of New York only by members of Local 807, and that those other drivers, union men themselves, would have to step down, turn over their trucks, and be idle in order to allow the 807 men to drive those trucks within the City of New York" (Record, fols. 523, 530).

POINT IV

The nature of the dispute which is the basis of the alleged "conspiracy".

At the trial in the District Court, the defendants, in order to establish the fact that the alleged "conspiracy" was a labor dispute, and also, that the rule sought to be enforced by Local 807 was not a purely selfish one, promulgated in the interest of its membership only, but was necessary or at least helpful in bringing order into the chaotic conditions which had hitherto prevailed in the industry; injurious alike to workers and employers,—offered to prove the facts involved in the development of the industry during recent years, its present condition, and the effect of the rule itself upon those conditions and its probable future effect. This proffer of proof was excluded on the ground that it did not affect *the only* issue in the case,—*which, the Court ruled, was that of violence.* This makes it impossible for us to explain fully the nature of the labor dispute involved. But the record contains sufficient evi-

dentiary matter to enable us, to at least sketch the nature of that dispute in its main outlines.

Perhaps the best way of approaching the problem is by calling attention to the fact that although some *three thousand* out of Local 807's ten thousand members are employed on over-the-road trucks (that is to say, take charge of trucks and drive them and unload them within the City), only twenty-four of them have been charged with being engaged in attempting to "obtain money" contrary to the statute. In this connection it must be remembered that, as the evidence shows, many truckers did not employ Local 807 men at all,—if they did, there would have been no "conspiracy". The three thousand members of Local 807 who are employed on over-the-road trucks therefore drive only a portion of the trucks which actually roll into New York City day by day. Just what portion, does not appear in the record,—because of the exclusion of the offer of proof already referred to. But, it does appear that the unionized over-the-road trucks having New York City as one of their termini, do not constitute the whole of that traffic. So that when we take the industry as a whole, one of two things must be true: Either the industry as a whole is largely unionized, as far as its New York end is concerned; or the "conspiracy" must have affected only a very tiny portion of that industry.

Government counsel, in their briefs both in the court below and in this Court, endeavor to explain the paucity of evidence of violence or threats of violence, by suggesting that the few cases of alleged violence or threats of violence had such a powerful effect upon all of the employers and truckmen engaged in the over-the-road trucking industry reaching New York City, that most of the employers considered it the better part of valor to make terms with the union. It is this suggestion that is advanced as the basis of the charge of "conspiracy" against the union itself. Government counsel say, in effect: "It is true that some three thousand members of Local 807 now work for over-the-road truckers, under contracts entered into with Local

807, and they are not heard to complain. But these contracts were the result of this powerful 'conspiracy', and they are therefore property obtained by the union from these employers by the use of violence, or threats of violence."

We need not, at this point, go into the question whether or not the assertion as to the *means* whereby those contracts were obtained is justified by the record. Our interest at this point centers on the fact that Government counsel *assume* that the largest part of the over-the-road trucking industry reaching New York *is* unionized. We believe that assumption to be true. And while there is no direct evidence to that effect, the atmosphere surrounding the trial,—particularly the absence from the witness stand of large employers, or the representatives of the several over-the-road trucking associations,—indicates that to be the fact.

We may now turn to the question as to what kind of truckers constitute the unionized portion of the industry, and what kind of truckers remain ununionized. Again, there is no direct evidence,—in the sense that no one gave any testimony on this subject. But the record is not entirely barren of evidence on the subject; and it clearly indicates that those who remained ununionized, or complained against unionization, were for the most part small truckers. Government counsel in their brief say that "in the typical case" the trucker was "a small-town business man". It may be added that he was not only a "small-town" business man, but a small business man. We recall only one instance of evidence of a trucker who operated a substantial number of trucks. The evidence also shows that "in the typical case", the trucker involved was *financially embarrassed*. Government counsel told the jury, and are trying to tell this Court, or at least intimate, that the financial embarrassment was the result of the unjustified demands of the union. *But the evidence shows* that "in the

typical case", *it was financial embarrassment that led to the trouble with the union.*[1]

We may now add some data bearing on this subject, which are matters of public record and public history, of which this Court may take judicial notice. A report issued by the Interstate Commerce Commission in 1936 had the following to say about the industry as a whole, as to the proportion of small-scale to large-scale operators:

> "*Scale of the Industry: Intercity* trucking has been and still is characterized by a large proportion of small-scale operators. While there are a considerable number of large enterprises, and more of medium size, data developed below justify the conclusion that about 70% of the establishments engaged in intercity for-hire trucking are 1-truck and 2-truck enterprises."[2]

The same report gives the following statistics:

The number of truckers who applied in 1935 for certificates or permits as motor carriers, under the Motor Carriers Act of 1935, was 25,864.

The number of trucks or "pieces of equipment" covered by these applications, was 90,307.

Truckers who owned over twenty-five trucks or "pieces of equipment," constituted but one and one-half percent of the total number of truckers who applied for certification.

21.7% of the trucks covered by the applications for certification were owned by *single carriers.*

The Interstate Commerce Commission divides all carriers, in respect to scale of operations, into three classes, known, respectively, as Classes I, II and III. Class I consists of truckers whose gross annual revenue exceeds $100,000. Class II consists of truckers whose gross annual revenue is between $25,000 and $100,000. Class III consists

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[1] This matter is discussed in greater detail in the accompanying brief on behalf of respondent Cahill.

[2] *Hours, Wages and Working Conditions in the Intercity Motor Transport Industry, Part II,* issued by Section of Research, Section of Labor Relations, Federal Coordinator of Transportation (Washington, D. C., November, 1936), p. 4.

of truckers whose annual revenue is below $25,000. A report issued by the Interstate Commerce Commission, relating to *Class I motor carriers*, for the year ending December 31, 1939, gives the following statistics:

The total number of carriers in that Class, during the year 1939, was 380.[3]

These 380 carriers operated 28,670 pieces of equipment.[4]

The revenue of these 380 carriers amounted to 52.68% of the entire industry; while the revenue of all others engaged in the industry amounted to only 47.32% thereof.[5]

It is clear from the foregoing figures that the small truckers are hard pressed by the concentration which is taking place in this industry, and that their struggle for survival is growing more difficult. That under these circumstances, the small trucker should feel the union wage scale and union working conditions burdensome is only natural. And it is also natural that he should blame "the union" for his troubles. It is particularly true,—and the record in this case would indicate,—that the union rules put the small trucker at a disadvantage as compared with his large competitor,—a fact which is true of labor union rules generally, and of most social legislation as well. The large trucker, because of the steady flow of trucks coming in and being unloaded, may utilize the services of the Local 807 member whom he employs at a greater advantage than his small competitor. The union contract does not deal with trucks,—there is no charge per truck. The union contract provides for a day's work to consist of eight hours. The large trucker can keep the union man employed for the whole of those eight hours. But the single

[3] The carriers covered by the table in question were restricted to those owning most of the equipment operated by them. It excluded carriers which reported expenses for "purchase transportation" in excess of 5% of total "operation and maintenance expenses". There are no comparable reports for Classes II and III.

[4] As used in this report, consists of trucks, truck tractors, trailers, and semi-trailers.

[5] *Statistics of Class I Motor Carriers, for the year ended December 31, 1939*, issued by Interstate Commerce Commission Bureau of Statistics, Table 3, p. 10.

trucker who brings in one truck, cannot keep a man employed during the entire eight hours, and he *therefore* says that the union is collecting "tribute" per truck,—since the union, like the law, does not take cognizance of fractions of a day.

We need not enter here into the question as to whether or not a union ought, under these circumstances, devise some other method of remuneration for its members. It would seem rather difficult to adjust the workers' needs to those of the small truckers, unless the truckers themselves organized some cooperative method, whereby a group of truckers would employ a union man, or a group of union men, to take care of their trucks as they came into town. But, all these considerations are beside the point in this case, for the question is not whether the union has correctly solved the problem involved, with due consideration to the needs of the small trucker, but rather whether there was a social problem which the union was seeking to solve.

Clearly, there was such a problem, and clearly, also, the dispute related as to the solution of this problem, and was as remote from "racketeering" *as is every other genuine labor dispute.*

In fact, this was a "typical" labor dispute. Or, perhaps, more correctly, one of the two best known types of labor disputes. For the history of labor disputes, as reported in histories and official publications, and as reflected in the cases which have come before our courts, shows two typical cases of labor dispute, insofar as scale of industry is concerned: The case of the very large employer, who deems himself powerful enough to defy the historic trend towards labor organization; and the case of the very small employer, who finds it difficult to adjust himself to that trend.

POINT V

The conviction of this respondent was clearly erroneous, and the decision of the Circuit Court of Appeals must be affirmed in any event.

We are primarily interested in a proper construction of the Anti-Racketeering Act, because of the menace which it has recently become to the labor movement,—particularly since this Court has set its face against the use of the Sherman Act as a means of settling labor disputes. There is serious danger that the Anti-Racketeering Act may not only become a substitute for the Sherman Act in that respect, but a greater menace to the labor movement than the Sherman Act ever was. But, after all, we have a specific case before us; and on this petition at least we must pay some attention to the particular judgment which the Government seeks to reinstate. We therefore respectfully submit that as to this respondent, at least, the judgment of the District Court was clearly erroneous, and its reversal by the Circuit Court of Appeals clearly right. We do not mean to suggest that that is not the case with respect to the individual defendants; but merely that there are *special questions* applicable to the case of Local 807 which require separate consideration, and certain special reasons why its conviction was wrong. That we shall proceed to do briefly.

A. According to the Government's version, Local 807 was the victim of a conspiracy hatched outside its own organization.

As Government's counsel presented the case to the jury at the trial in the District Court, and as they urged the correctness of the judgment of the District Court upon the Circuit Court of Appeals, it is manifest that if the Government contentions be correct, Local 807, instead of being the centre of the conspiracy, was the victim of a conspiracy hatched by outsiders, as a result of which

these outside conspirators became members of Local 807, and two of them its officials, in order to be in a better position to carry out that outside conspiracy (Record, fols. 6286-6288, 7122, 7140, 7220-7223). Nor have they abandoned that theory in this Court, even though they soft-pedal it. We respectfully submit that, if that contention be true, the judgment of the District Court convicting this respondent was clearly wrong, and the judgment of reversal must be affirmed.

B. According to the Government's contention, the purpose of the outside conspiracy was not to obtain contracts for Local 807, but money for the outside conspirators.

According to what may be called the "outside conspiracy" version of the case, as presented by the Government in the courts below, the purpose of the conspiracy was not to obtain contracts for Local 807, but pieces of money for the individuals. This is the theory upon which Government counsel now urge the reversal of the judgment of the Circuit Court of Appeals, and the reinstatement of the judgment of the District Court with respect to the individual defendants; although in some other portions of their brief they seem to include the obtaining of the contracts between Local 807 and employers within the conspiracy.

That the obtaining of contracts was a legitimate labor union activity, and therefore not within the purview of the Act, has been demonstrated above. With that settled, the conspiracy reduces itself to the obtaining of "money", to which conspiracy the union could not be a party, and clearly was not a party. Moreover, in what we have called the "outside conspiracy", the acts of neither the members nor of the officials of Local 807 can be charged to it in this case, under the provisions of the Norris-LaGuardia Act.

Act of March 23, 1932, Sec. 6; 29 USCA 106.

But even without this special provision, and even in a case of ordinary civil liability, Local 807 could not be held responsible for the acts of the individual defendants, under such circumstances, since these members and officials were serving interests of their own.

M. L. Ins. Co. v. *Forty Second etc. Co.*, 139 N. Y. 146;
Bank of New York v. *Am. D. & J. Co.*, 143 N. Y. 559;
Ward v. *City Trust Co.*, 192 N. Y. 61;
Porges v. *U. S. Mortgage & Trust Co.*, 203 N. Y. 181;
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Wen Kroy R. Co. v. *Public Nat. Bank*, 260 N. Y. 84.

In this connection, attention is also respectfully called to the recent decision of this Court, under the Norris-LaGuardia Act, but in a case of civil litigation.

Milk Wagon Drivers Union v. *Lake Valley Farm Products*, 311 U. S. 91.

C. The dismissal of the indictment against the officers constituting the governing body of this respondent, is proof of lack of authorization or ratification.

The record discloses that the indictment as originally found included, as defendants, all of the officers of Local 807, eight in number; and that these eight constituted its governing board. At the opening of the case, the Government moved to dismiss against six members of its governing board who were its principal officers,—leaving Campbell and Farey, two of its business agents, as the only members of its governing board among the defendants who went to trial.

We respectfully submit that the dismissal of the indictment against the officers of the union, constituting a ma-

jority of its governing board, is conclusive proof that the union never authorized or ratified the acts of the individuals who went to trial and were convicted. The motion of the Government was in fact a confession by the Government, not only that the officers against whom the indictment was dismissed were guiltless of the conspiracy charged, but that the union itself was guiltless of that conspiracy.

It must be borne in mind that an association, whether incorporated or unincorporated, can only act through authorized agents; and that its governing board is the only authorized agent who could formulate a *policy* on its behalf. But a majority of the governing board were confessedly guiltless of the conspiracy charged in the present indictment. No action could therefore be authorized unless the board did so. Furthermore, the six members of the governing board against whom the indictment was dismissed comprised its principal officers. We are therefore dealing with a case in which, *concededly*, both the principal officers and the board were guiltless of the conspiracy. Under those circumstances, we respectfully submit, there is not the slightest basis for the imputation of guilt to the organization.

D. The Trial Court committed reversible error in excluding testimony as to the objects of the union in enforcing the regulation which is the basis of the charge.

We contended in the District Court, as we do here, that the provisions excepting wages, and even more so the *proviso* in the jurisdictional section of the Act, made the legitimacy of the objects or purpose of the union in adopting and enforcing the regulation which is the basis of the charge, crucial on the question of guilt. We therefore offered to prove the conditions of the industry as far as labor conditions were concerned and the purpose of the regulations, in order to prove *affirmatively* the legitimacy of the objects pursued by Local 807 in the policy adopted by it, which limited driving within the City of New York to its membership. We did not care to rest on the admitted

fact that the union was endeavoring to obtain employment for its members, although that alone was sufficient to take the case out of the purview of the Anti-Racketeering Act, and offered to prove that the purpose was not only legitimate within this Act, but also justified by broader social considerations. This proof was excluded on the theory, advanced by the prosecution and adopted by the Court, that the legitimacy of the purposes and objectives of the union was immaterial to the case, as long as violence had been proven.

We note with satisfaction that the Government has receded from that position in this Court,—at least that is our impression from the rather vague language of Government counsel's brief. But if it be conceded, *as it must be*, that the mere presence of violence does not destroy the *proviso*, then, clearly, the objectives of the union in the pursuit of which the violence was used becomes *the* issue in the case. The Trial Court having excluded the evidence offered on the main issue which the jury should have been called upon to decide, it is difficult to see on what theory this Court can be asked to reinstate the judgment.

E. The Trial Court committed reversible error in its charge to the jury, and its refusal to charge as requested.

It is equally clear that if, as we believe now to be conceded by the Government, the mere presence of violence does not nullify the *proviso*, the Court's charge to the jury, and particularly, *the refusal to charge as requested*, was reversible error, and the judgment was properly reversed for that error. In view of the fact that the opinion of the Court below covers that point, we shall refrain from discussing it here.

F. The conviction of this respondent on all of the four counts of the indictment is contrary to the constitutional guarantee against double jeopardy.

There is one matter, however, which we *must* call to the attention of the Court,—a matter that we believe to be

of grave importance, because it, too, involves constitutional guarantees.

This respondent was convicted on all of the four counts of the Anti-Racketeering indictment, and a separate fine was imposed under each count. The Government seeks to reinstate that judgment, but nowhere do Government counsel even attempt to justify the conviction of this respondent, along with many of the individual defendants, on more than one count of the indictment. In the court below, they sought to justify the convictions on more than one count by the spinning of a remarkable net of cobwebs. Judge Learned Hand, in his opinion on behalf of the majority of the Circuit Court of Appeals, discussed at some length the two sub-sections of the Act under which the first two counts of the indictment were laid, coming to the conclusion that the second sub-section added nothing to the first,—and could not therefore be made the basis of a separate count. And then added:

> *"We can attach no meaning to the third and fourth counts."*

This clearly disposes of the conviction of any of the defendants of more than one count. But we do not care to leave it at that, for the reason that we believe that, correct as the decision of the Court below was, and sufficient as it is for our purposes in this case, it left out of consideration a serious constitutional point, in which all those who are anxious about preserving the integrity of constitutional guarantees should be concerned.

We respectfully submit that quite aside from the possible meaning that could be attached to the various sub-sections of this "loosely-drawn" Act, and of the meaninglessness of the third and fourth counts of the indictment herein, there is the principle, which we believe to be basic in our law, that no one can be prosecuted or convicted more than once for the same act or the same conspiracy. We do not mean to say that a prosecuting officer, drafting an indictment, not knowing exactly the nature of the proof

that he would be able to produce at the trial, or the aspect of the case which the jury may consider has offended against the law in question, may not draft an indictment in several counts, each count laid under a different provision of the law; in the expectation that at the conclusion of the trial, he would elect on which count to proceed, or, in a proper case, the Court would instruct the jury as to which aspect of the case comes under what provision of the law; *coupled with the instruction that there can be but one conviction for one act or one conspiracy.* In the case at bar there *concededly* was but one conspiracy. Nevertheless, the jury was permitted, by the instructions of the Trial Court, to convict under all of the four counts, and the jury did so convict.

We take it that it will be conceded, that if the indictment had contained only one count, a conviction on that count would have been a bar to another prosecution for the same conspiracy on another indictment laid under a different sub-section of the Act. Such a further prosecution would be barred by the constitutional guarantee against double jeopardy. But, clearly, the constitutional protection against double jeopardy cannot be evaded by indicting a person on several counts in the same indictment, *when, concededly, the conspiracy charged is the same in all the counts.*

As already stated, counsel for the Government completely ignored this phase of the case in their brief in this Court. We may therefore assume that they will not contend that in recent times the constitutional guarantee against double jeopardy has been abolished with respect to *double convictions,* whatever their claim may be with respect as to that which must be charged in order to sustain an indictment. We may therefore leave the matter by quoting from a rather oldish case,—which, however, is the leading case on the subject,—that of *Commonwealth* v. *Roby*, decided by the Supreme Judicial Court of Massachusetts.

> "This plea—said that famous Court—of *a former conviction*, like that of a former acquittal, is founded

upon that great principle and fundamental maxim of criminal jurisprudence, that *no man shall be twice put in jeopardy for the same offense.* "This is one of the ancient and well established principles of the common law, sanctioned and enforced, in different forms of words, in most of the constitutions of the several States, and in that of the United States. In the latter it is thus expressed:—'Nor shall any person be subject, for the same offense, to be twice put in jeopardy of life or limb'. * * *

"Thus, where the court before which the former trial took place had no jurisdiction of the offense, the party cannot be deemed in law to have been put in jeopardy, because no valid and binding judgment could have been rendered by such court. * * *

"From these considerations it appears to us that the true test, to determine whether a conviction or acquittal upon one indictment is a good bar to another, is well expressed in East's Crown Law, as drawn from the case of Rex v. Vandercomb and Abbott, 2 Leach, 816, 'These cases establish the principle, that unless the first indictment were such as *the prisoner might have been convicted upon by proof of the facts contained in the second indictment*, an acquittal on the first indictment can be no bar to the second.' 2 East's P. C. 522.

"So in a recent case the doctrine was recognized, that such plea is no bar, *unless the facts charged in the second indictment would have warranted a conviction on the first.* (Rex v. Taylor, 3 Barn. & Cressey, 502.) * * *

"This rule seems perfectly reasonable and just, and is well calculated to give effect to the principle, that no one shall be twice tried for the same offense. *For otherwise, if the facts charged in the indictment now pending, could have been given in evidence, and would have supported the former indictment, then, though formerly convicted in the Municipal Court, the prisoner might be here again convicted of precisely the same offense, and so be twice punished for the same crime.* Or, should he have been acquitted on the former indictment upon a trial here be convicted, contrary to the plainest principles of justice and of criminal jurisprudence."

Commonwealth v. *Roby*, 12 Pick. 496, 501-504.

CONCLUSION

It is clear from the foregoing that the decision of the Circuit Court of Appeals sought to be reviewed on this petition was right, and should be affirmed.

Dated: New York, January, 1942.

Respectfully submitted,

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